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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

TWITTER, INC.,

Plaintiff,

v.

WILLIAM P. BARR, Attorney
General of the United States, *et al.*,

Defendants.

Case No. 14-cv-4480-YGR

**NOTICE OF MOTION AND CONSENT
MOTION OF THE AMERICAN CIVIL
LIBERTIES UNION, THE AMERICAN CIVIL
LIBERTIES UNION OF NORTHERN
CALIFORNIA, AND THE AMERICAN CIVIL
LIBERTIES UNION OF SOUTHERN
CALIFORNIA FOR LEAVE TO FILE AN
AMICUS CURIAE BRIEF IN SUPPORT OF
TWITTER, INC.'S OPPOSITION TO
DEFENDANTS' INVOCATION OF STATE
SECRETS AND MOTION TO DISMISS**

Hon. Yvonne Gonzalez Rogers

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the American Civil Liberties Union, the American Civil Liberties Union of Northern California, and the American Civil Liberties Union of Southern California respectfully move this Court for leave to file a brief as amici curiae in support of Twitter, Inc.’s opposition to Defendants’ invocation of the state secrets privilege and motion to dismiss. A copy of the proposed amicus curiae brief is attached to this submission. This brief is filed with the consent of all parties.

I. STANDARD FOR MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

District courts may liberally exercise discretion to allow third parties to participate in a matter as amici curiae. *Woodfin Suite Hotels, LLC v. City of Emeryville*, No. C 06-1254 SBA, 2007 WL 81911, at *3 (N.D. Cal. Jan. 9, 2007). The only criterion is that an applicant’s “participation is useful or otherwise desirable to the court.” *Id.* (quotation marks omitted). In particular, district courts frequently welcome amicus briefs “concerning legal issues that have potential ramifications beyond the parties directly involved.” *Sonoma Falls Devs., LLC v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003).

II. STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with more than 1.5 million members dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. The ACLU of Northern California and the ACLU of Southern California are state affiliates of the national ACLU. The ACLU, ACLU of Northern California, and ACLU of Southern California have appeared before federal courts in numerous cases implicating civil liberties and the state secrets privilege, including as counsel in *Fazaga v. FBI*, 916 F.3d 1202 (9th Cir. 2019), *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc), *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *Wikimedia Foundation v. NSA*, 335 F. Supp. 3d 772 (D. Md. 2018), and as amicus in *Ibrahim v. U.S. Department of Homeland Security*, 912 F.3d 1147 (9th Cir. 2019).

Counsel for amici curiae certify that no party's counsel authored this brief in whole or in part, and no person other than amici curiae, their members, or their counsel made a monetary contributions to its preparation or submission.

III. AMICI CURIAE'S EXPERTISE WILL BENEFIT THIS COURT

Amici curiae have considerable expertise on the state secrets privilege in the context of cases that, like this one, implicate civil liberties and national security. In light of that expertise, amici seek to help the Court by providing historical context and perspective as to the application of the state secrets privilege. It is especially important that the Court consider the contribution of the third-party organizations with particular expertise on this issue, as the outcome of the matter now before the Court has ramifications for the scope of the government's power to withhold evidence in—and even prevent adjudication of—a wide range of cases implicating fundamental constitutional rights. *See Sonoma Falls*, 272 F. Supp. 2d at 925.

IV. CONCLUSION

For these reasons, the ACLU, ACLU of Northern California, and ACLU of Southern California respectfully request that the Court grant this motion for leave to file the accompanying brief.

Respectfully submitted,

Dated: May 6, 2019

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**[PROPOSED] BRIEF OF AMICI CURIAE
THE AMERICAN CIVIL LIBERTIES UNION,
THE AMERICAN CIVIL LIBERTIES UNION
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AMERICAN CIVIL LIBERTIES UNION OF
SOUTHERN CALIFORNIA IN SUPPORT OF
TWITTER, INC.'S OPPOSITION TO
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SECRETS AND MOTION TO DISMISS**

Hon. Yvonne Gonzalez Rogers

CORPORATE DISCLOSURE STATEMENT

Amici curiae American Civil Liberties Union (“ACLU”), ACLU of Northern California, and ACLU of Southern California state that they do not have parent corporations. No publicly held corporation owns 10% or more of any stake or stock in amici curiae.

Dated: May 6, 2019

/s/ Matthew Cagle

Matthew Cagle

Attorney for Amici Curiae

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STATEMENT OF INTEREST¹

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with more than 1.5 million members dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. The ACLU of Northern California and the ACLU of Southern California are state affiliates of the national ACLU. The ACLU, ACLU of Northern California, and ACLU of Southern California have appeared before federal courts in numerous cases implicating civil liberties and the state secrets privilege, including as counsel in *Fazaga v. FBI*, 916 F.3d 1202 (9th Cir. 2019), *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc), *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *Wikimedia Foundation v. NSA*, 335 F. Supp. 3d 772 (D. Md. 2018), and as amicus in *Ibrahim v. U.S. Department of Homeland Security*, 912 F.3d 1147 (9th Cir. 2019).

INTRODUCTION

This is an extraordinary case. The government advances a set of unprecedented arguments about the scope of its authority to thwart a plaintiff’s access to an Article III court. If the Court were to accept these arguments, it would endorse a dramatic expansion of the state secrets privilege—an expansion contrary to established law, and with far-reaching implications for future cases in which alleged rights violations touch on classified material.

More than two years ago, the government voluntarily entered a classified declaration into evidence in support of its motion for summary judgment. The Court determined that this declaration, which consisted largely of “generic” and “seemingly boilerplate” material, failed to establish that the government’s restrictions on Twitter’s speech satisfied the First Amendment. In response to the Court’s Order to Show Cause why the declaration should not be disclosed to Twitter’s security-cleared counsel, the government asserted, for the first time, that the declaration is a now a state secret, must be removed from the case, and mandates dismissal of

¹ This brief is filed with the consent of all parties. Counsel for amici curiae certify that no party’s counsel authored this brief in whole or in part, and no person other than amici curiae, their members, or their counsel made a monetary contributions to its preparation or submission.

1 this suit. Amici are not aware of any case supporting the application of the privilege in these
2 circumstances, and the government cites to none.

3 What is even more troubling is that the government makes this argument in the
4 alternative. In other words, the government’s position is that if the declaration must be disclosed
5 to Twitter’s security-cleared counsel, it is a state secret to be stripped from the evidentiary
6 record—but if not, it is not. Unsurprisingly, the law of the state secrets privilege does not
7 countenance these kinds of games. The privilege is too powerful a tool, and too susceptible to
8 abuse, to permit its casual invocation for a tactical advantage.

9 At bottom, the facts and circumstances of this case make plain that the declaration is not
10 subject to the privilege. And even if it were, the result is simply that the declaration is removed
11 from the case, and the litigation proceeds accordingly. Dismissal on the basis of the privilege is
12 entirely inappropriate here.

13 ARGUMENT

14 I. The Court Should Reject the Government’s Invocation of the Privilege.

15 A. Both precedent and history show why the Court must conduct a particularly 16 searching inquiry of the government’s claim of privilege.

17 A look at several of the government’s past invocations of the state secrets privilege
18 makes clear why this Court must, as the Ninth Circuit has demanded, undertake an especially
19 searching evaluation of the government’s assertion of the privilege in this case.

20 The state secrets privilege is a common law evidentiary rule that, when properly invoked,
21 allows the government to withhold information from discovery by establishing “there is a
22 ‘reasonable danger’ that disclosure will ‘expose military matters which, in the interest of national
23 security, should not be divulged.’” *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190,
24 1196 (9th Cir. 2007) (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)). The government
25 bears the burden of establishing the privilege, which is “is not to be lightly invoked.” *Reynolds*,
26 345 U.S. at 7. As courts have repeatedly admonished, the government may not use the privilege
27 “to shield any material not strictly necessary” to prevent harm to national security. *Mohamed v.*
28 *Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1082 (9th Cir. 2010) (en banc) (quoting *Ellsberg v.*

1 *Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983)). “Because evidentiary privileges by their very nature
 2 hinder the ascertainment of the truth, and may even torpedo it entirely, their exercise ‘should in
 3 every instance be limited to their narrowest purpose.’” *In re United States*, 872 F.2d 472, 478–79
 4 (D.C. Cir. 1989) (citation omitted).

5 Assertions of the state secrets privilege are therefore subject to the most stringent judicial
 6 scrutiny. The courts’ active role in evaluating the government’s claims of privilege is essential,
 7 as it “ensure[s] that” the privilege applies only when absolutely necessary. *Jeppesen*, 614 F.3d at
 8 1082 (quoting *Ellsberg*, 709 F.2d at 58). Courts must “take very seriously [their] obligation to
 9 review the government’s claims with a very careful, indeed a skeptical, eye, and not to accept at
 10 face value the government’s claim or justification of privilege.” *Id.* at 1077 (alteration omitted)
 11 (quoting *Al-Haramain*, 507 F.3d at 1203). As a result, successful claims of the privilege are
 12 found only “in exceptional circumstances.” *Id.*

13 The Ninth Circuit has emphasized that mere classification “is insufficient” for use as a
 14 proxy to determine whether information is subject to the privilege. Blind acceptance of
 15 government classification as a basis for applying the privilege “would trivialize the court’s role,
 16 which the Supreme Court has clearly admonished ‘cannot be abdicated to the caprice of
 17 executive officers.’” *Id.* at 1082 (quoting *Reynolds*, 345 U.S. at 9–10). It would also ignore
 18 reality. Even leading members of the intelligence community have acknowledged that not all
 19 classification decisions would withstand judicial scrutiny, and disclosure of classified material
 20 may not lead to harm at all—let alone the type of harm required to be shown in the state secrets
 21 context.²

22
 23 ² See, e.g., *Nom. of Lt. Gen. James Clapper, Jr., USAF, Ret., to Be Dir. of Nat’l Intelligence:*
 24 *Hearing Before S. Select Comm. on Intel.*, 111th Cong. 18 (July 20, 2010) (testimony of then-
 25 nominee to the position of the Director of National Intelligence James Clapper), https://fas.org/irp/congress/2010_hr/clapper.pdf (stating that “we do overclassify” both as an “administrative
 26 default” and to “hide or protect things for political reasons,” and suggesting that “we can be a lot
 27 more liberal . . . about declassifying, and we should be”); *Oversight of the FBI: Hearing Before*
 28 *the S. Comm. on the Judiciary*, 115th Cong. (May 3, 2017), 2017 WL 1684512 (testimony of
 then-FBI Director James Comey) (agreeing that “over classification is a very significant problem
 within the executive branch” and that the release of classified material may not cause any harm).

1 In *Reynolds*, the case establishing the modern roots of the state secrets evidentiary
 2 privilege, the Supreme Court cautioned that abandonment of judicial control over the privilege
 3 would open the door to “intolerable abuses.” 345 U.S. at 8. More generally, courts have
 4 recognized “the risk that government officials may be motivated to invoke the state secrets
 5 doctrine not only by their obligation to protect national security,” but also by illegitimate and
 6 self-serving reasons. *Jeppesen*, 614 F.3d at 1085 n.8.

7 Indeed, the government’s conduct in other cases involving assertions of the state secrets
 8 privilege has repeatedly justified these concerns.

9 In *Reynolds* itself, the government engaged in exactly the kind of abuse that both the
 10 Ninth Circuit and the Supreme Court have warned against. *Reynolds* was a civil suit against the
 11 government brought by the estates of civilians killed in a military plane crash. *Reynolds*, 345
 12 U.S. at 3. When the plaintiffs sought production of the Air Force’s accident report, the
 13 government asserted that the report should be protected by the state secrets privilege because the
 14 aircraft that had crashed was engaged in a “highly secret mission,” and disclosure of the report
 15 would “seriously hamper[] national security.” *Id.* at 3–4. Several decades later, the accident
 16 report was declassified—and lo and behold, it turned out to contain no “details of any secret
 17 project the plane was involved in” (as the government had declared to the courts), but instead
 18 detailed “a horror story of incompetence, bungling, and tragic error.” Garry Wills, *Why the*
 19 *Government Can Legally Lie*, 56 N.Y. Rev. of Books 32, 33 (2009); see also *Jeppesen*, 614 F.3d
 20 at 1094 n.1 (Hawkins, J., dissenting) (noting that in *Reynolds*, “avoidance of embarrassment—
 21 not preservation of state secrets—appears to have motivated the Executive’s invocation of the
 22 privilege”).

23 Similarly—and famously—in *New York Times Company v. United States* (*Pentagon*
 24 *Papers*), 403 U.S. 713 (1971), the government sought to enjoin the *New York Times* and
 25 *Washington Post* from publishing the contents of a classified study about the Vietnam War. The
 26 government asserted that disclosure would “pose a grave and immediate danger to the security of
 27 the United States.” Brief for Appellant at 3, *Pentagon Papers*, 403 U.S. 713 (Nos. 1873, 1885),
 28

1 1971 WL 167581, at *2, *7, *21, *26 (June 26, 1971). The Solicitor General later admitted,
 2 however, that he “[had] never seen any trace of a threat to the national security from the
 3 publication” and had not “seen it even suggested that there was such an actual threat.” Erwin
 4 Griswold, *Secrets Not Worth Keeping*, Wash. Post, Feb. 16, 1989, <https://wapo.st/2vybD7n>.
 5 Rather, he explained, “there is massive overclassification and . . . the principal concern of the
 6 classifiers is not with national security, but rather with governmental embarrassment of one sort
 7 or another.” *Id.*

8 More recently, the government’s opportunistic invocation of the state secrets privilege
 9 has earned a rebuke from the Ninth Circuit. In *Ibrahim v. U.S. Department of Homeland*
 10 *Security*, 912 F.3d 1147 (9th Cir. 2019) (en banc), the plaintiff’s lawyers sought attorneys’ fees
 11 after successfully challenging the plaintiff’s placement on the “No Fly” list. Although the
 12 government knew that this placement was the result of a mistake, it had continued to
 13 “unreasonabl[y]” defend the litigation. *Id.* at 1171. In the course of defending the case, the
 14 government had played “discovery games” with the state secrets privilege and “made false
 15 representations to the court” about whether it would seek to rely on state secrets at trial. *Id.* at
 16 1162–65, 1171 & n.20. After a bench trial (over the government’s state secrets objections), the
 17 district court found in the plaintiff’s favor. *Id.* It also found that the plaintiff was entitled to
 18 attorneys’ fees, but not to a rate enhancement because the government had not acted in “bad
 19 faith.” *Id.* at 1165. On appeal, the Ninth Circuit reversed the district court’s “bad faith” finding
 20 on several grounds. *Id.* at 1182. The court was particularly concerned that, even though the
 21 government had conceded that the plaintiff was not a threat to national security, it continued to
 22 place her on a watchlist for no apparent reason—and its justification was “claimed to be a state
 23 secret.” *Id.* at 1160, 1171, 1182.

24 And in *Horn v. Huddle*, 647 F. Supp. 2d 55 (D.D.C. 2009), *vacated upon settlement*, 699
 25 F. Supp. 2d 236 (D.D.C. 2010), the government “committed fraud on [the district court] and the
 26 Court of Appeals” by “knowingly failing to correct a declaration” in support of the state secrets
 27 privilege “that had been shown to be demonstrably false.” 647 F. Supp. 2d. at 58 & n.3. The
 28

1 court concluded that the government’s actions “c[ould] only be construed as an attempt to
 2 dishonestly gain dismissal.” *Id.* at 58 n.3. Separately, the court concluded that “the government
 3 had not carefully thought through its assertion of the privilege,” because a second classified
 4 declaration from the Director of the Central Intelligence Agency had appeared to “significantly
 5 conflict[.]” with an unclassified version of the same. *Id.* at 58. The court ultimately rejected the
 6 government’s assertion of the state secrets privilege and request for a protective order, and it
 7 determined that the case could proceed using procedures akin to those established by the
 8 Classified Information Procedures Act, 18 U.S.C. app. III. *Id.* at 59–60. Instead of complying
 9 with the court’s order, the government filed a motion “essentially ask[ing] for reconsideration,”
 10 in which the government sought another chance to argue that it had properly invoked the
 11 privilege. *Id.* at 60. The court observed that “[n]othing the government cites indicates that the
 12 Court must give the government a ‘second chance’ to convince it that the privilege applies,” and
 13 denied the government’s request. *Id.* at 61.

14 As these examples show, as long as the government retains the incentive to play fast and
 15 loose with the state secrets privilege, the privilege will continue to open the door to government
 16 abuse. To guard against such abuse and ensure that “the state secrets doctrine does not represent
 17 a surrender of judicial control over access to the courts,” *Jeppesen*, 614 F.3d at 1082 (quoting *El-*
 18 *Masri v. United States*, 479 F.3d 296, 312 (4th Cir. 2007)), this Court must assess the
 19 government’s assertion of the state secrets privilege with searching scrutiny—and an extra dose
 20 of skepticism where, as here, particular circumstances warrant it.

21 **B. In other noncriminal cases, disclosure of classified information to security-**
 22 **cleared counsel has not harmed national security.**

23 The Court also has the benefit of decades of noncriminal litigation in the federal courts
 24 since *Reynolds* in which classified information has been disclosed to security-cleared counsel
 25 without any resulting harm to national security. For example, in *Loral Corp. v. McDonnell*
 26 *Douglas Corp.*, a case involving a large volume of classified information, the Second Circuit
 27 explained that “[t]he Department of Defense has cleared, or can and will clear, for access to the
 28 material the judge and magistrate assigned to the case, the lawyers and any supporting personnel

1 whose access to the material is necessary.” 558 F.2d 1130, 1132 (2d Cir. 1977). This approach is
 2 in keeping with courts’ broad practice of using security-cleared counsel in noncriminal cases to
 3 ensure effective litigation of a wide variety of sensitive topics. *See, e.g., Al Bakri v. Obama*, 660
 4 F. Supp. 2d 1, 2 (D.D.C. 2009) (ordering disclosure of facts concerning detainees at Bagram
 5 Airbase in Afghanistan to security-cleared counsel); *Ibrahim v. Dep’t of Homeland Sec.*, C 06-
 6 00545 WHA, 2013 WL 1703367 (N.D. Cal. Apr. 19, 2013) (ordering disclosure of documents
 7 pertaining to the “No Fly” list to Sensitive Security Information-cleared counsel); *KindHearts for*
 8 *Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010)
 9 (ordering that counsel for charity contesting freezing of its assets “obtain an adequate security
 10 clearance to view the necessary documents, and will then view these documents in camera, under
 11 protective order, and without disclosing the contents to [plaintiff]”).³

12 Critically, disclosure to security-cleared counsel under secure conditions is not the
 13 equivalent of a general public disclosure. *See Al-Haramain Islamic Found., Inc. v. U.S. Dep’t of*
 14 *Treasury*, 686 F.3d 965, 983 (9th Cir. 2012) (disclosing information to a “lawyer for the
 15 designated entity who has the appropriate security clearance also does not implicate national
 16 security when viewing the classified material because, by definition, he or she has the
 17 appropriate security clearance”). And, of course, the degree of disclosure to security-cleared
 18 counsel can be tailored to the necessities of the case.⁴

19 _____
 20 ³ In recent years, the federal courts have also applied their expertise and experience handling
 21 classified information in habeas cases brought by Guantánamo detainees. Those courts have
 22 developed workable procedures designed to allow reasonable access to classified evidence, while
 23 protecting the government’s secrecy interest. *See* Constitution Project & Human Rights First,
 24 *Habeas Works: Federal Courts’ Proven Capacity to Handle Guantánamo Cases—A Report from*
 25 *Former Federal Judges*, at 17 (June 2010), [https://constitutionproject.org/wp-content/uploads/](https://constitutionproject.org/wp-content/uploads/2012/10/414.pdf)
 26 [2012/10/414.pdf](https://constitutionproject.org/wp-content/uploads/2012/10/414.pdf) (describing procedures that seek “to strike a careful balance between protecting
 27 classified information and ensuring that petitioners have enough information to challenge their
 28 detention”).

⁴ *See generally Hanna v. Plumer*, 380 U.S. 460, 472–73 (1965) (noting that, subject to
 congressional limitations but “completely aside from the powers Congress expressly conferred
 in” the Federal Rules of Civil Procedure, “the administration of legal proceedings [is] an area in
 which federal courts have traditionally exerted strong inherent power”); Amy Coney Barrett,
Procedural Common Law, 94 Va. L. Rev. 813, 842–78 (2008) (discussing federal courts’

C. The circumstances of this case and the government’s invocation of the state secrets privilege show that the privilege is inapplicable.

The facts of this case, set forth fully in Twitter’s opposition brief, make plain that the government’s invocation of the state secrets privilege is improper. *See* Pl. Opp. 4–17. A few key points bear emphasis. First, the government voluntarily entered the classified Steinbach declaration into evidence more than two years ago. It now contends that the declaration is so sensitive that it must be removed from the case, yet the government’s delay in asserting the privilege suggests otherwise. *Cf. Horn*, 647 F. Supp. 2d at 58 (observing that the government invoked the state secrets privilege “too broadly, inconsistently, and sloppily”). Second, at least some of the information that the government contends is a “state secret” is already in Twitter’s possession. *See* Gov. Br. 10, ECF No. 281 (describing four categories of information at issue, the first of which is “Information Regarding National Security Legal Process that Has Been Served on Twitter”). The notion that it would harm national security to disclose *this* information in particular to Twitter’s security-cleared counsel is deeply suspect. And finally, the Court—in its opinion denying the government’s motion for summary judgment—has *already* found that the classified Steinbach declaration “largely relies on a generic, and seemingly boilerplate, description of the mosaic theory and a broad brush concern that the information at issue will make more difficult the complications associated with intelligence gathering in the internet age.” *Twitter, Inc. v. Sessions*, 263 F. Supp. 3d 803, 817 (N.D. Cal. 2017).

In light of the government’s belated and unusual invocation of the state secrets privilege over material already found to be “generic” and “seemingly boilerplate,” the Court should hold that the privilege is inapplicable, and it should deny the government’s request to discharge the Order to Show Cause.

II. Even if the State Secrets Privilege Applies to the Classified Steinbach Declaration, Dismissal Here Is Improper.

Even where a court has determined that an invocation of the *Reynolds* evidentiary privilege is valid, the result is not the automatic dismissal of a litigant’s claims. “The effect of
“inherent authority over procedure”).

the government’s successful invocation of [the state secrets] privilege is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of evidence.” *Al-Haramain*, 507 F.3d at 1204 (quotation marks omitted); accord *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011) (“The privileged information is excluded and the trial goes on without it.”). In other words, when privileged evidence is excluded, both sides are deprived of its use, and the case proceeds as if that evidence did not exist. *See, e.g., In re Sealed Case*, 494 F.3d 139, 145 (D.C. Cir. 2007) (describing this “well established” principle).

Under Ninth Circuit law, there are only two narrow exceptions to this rule—neither of which applies in this case, as explained below. After excluding the privileged evidence, dismissal is required only if (i) “the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim”; or (ii) the privileged and non-privileged evidence is “inseparable[,] . . . such that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.” *Fazaga v. FBI*, 916 F.3d 1202, 1227–28, 1253 (9th Cir. 2019) (quotation marks omitted) (quoting *Jeppesen*, 614 F.3d at 1083).⁵

When the executive branch contends that one of these exceptions applies and compels dismissal, courts subject the government’s arguments to exacting scrutiny. *See, e.g., id.* at 1253 (“allowing the mere prospect of a privilege defense, without more, to thwart a citizen’s efforts to vindicate his or her constitutional rights would run afoul” of Supreme Court guidance (quotation marks omitted)); *In re United States*, 872 F.2d at 478–79 (rejecting the government’s argument that the district court would be unable to disentangle sensitive from non-sensitive information). The reviewing court must carefully determine for itself whether litigation may go forward in light of the judiciary’s constitutional “duty . . . to say what the law is.” *Marbury v. Madison*, 5

⁵ The Ninth Circuit has identified a third “circumstance[.]” in which the *Reynolds* privilege may result in dismissal: when a plaintiff lacks sufficient evidence to present a *prima facie* case due to the removal of privileged evidence. *Fazaga*, 916 F.3d at 1227–28. That scenario is not an “exception” to the ordinary *Reynolds* rule, but an application of it. When privileged evidence is excluded, both sides are simply deprived of its use and the plaintiff may ultimately be unable to mount its affirmative case.

U.S. (1 Cranch) 137, 177 (1803).⁶ Courts therefore use “creativity and care” to devise “procedures which would protect the privilege and yet allow the merits of the controversy to be decided in some form.” *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985). Dismissal is available only as a last resort.

A. The Court has already determined that the classified Steinbach declaration does not establish a “valid defense.”

Under the “valid defense” exception, dismissal on the basis of the *Reynolds* privilege is permissible only when the privileged evidence establishes a legally meritorious defense. *See Fazaga*, 916 F.3d at 1253. The Ninth Circuit has explained that a “valid defense” is:

meritorious and not merely plausible and *would require judgment for the defendant*. The state secrets privilege does not require dismissal of a complaint for any plausible or colorable defense. Otherwise, virtually every case in which the United States successfully invokes the state secrets privilege would need to be dismissed. Such an approach would constitute judicial abdication from the responsibility to decide cases on the basis of evidence in favor of a system of conjecture.

Id. (quotation marks and citations omitted) (emphasis added).

The origins of this exception illustrate just how narrow it is. The D.C. Circuit first applied the “valid defense” exception in *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984). There, the plaintiff asserted that the FBI’s refusal to hire him violated his First Amendment rights because the decision was based on his father’s political activities. *Id.* at 819. In response, the FBI invoked the state secrets privilege. It filed an in camera declaration to explain why it denied the plaintiff employment and to justify the privilege. *Id.* at 819, 825. In the course of reviewing the FBI’s assertion of the privilege, the D.C. Circuit concluded that the in camera declaration contained material that “ipso facto disclose[d] to the court the validity of the defense.” *Id.* at 825. To allow

⁶ When the executive branch seeks dismissal of a case in an Article III court on the basis of the state secrets privilege, it raises grave separation-of-powers concerns. The “judicial Power” conferred by Article III belongs to the courts alone; it may not be ceded to or exercised by any other branch. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58–59 (1982). It has long been held that neither the legislature nor the executive may “prescribe rules of decision to the Judicial Department of the government in cases pending before it.” *United States v. Klein*, 80 U.S. 128, 146 (1871).

the plaintiff's claim to proceed in those circumstances would have "involve[d] an attempt, however well intentioned, to convince the jury of a falsehood." *Id.*; *see also, e.g., In re Sealed Case*, 494 F.3d at 149–50 (adopting the narrow articulation of the exception in *Molerio*); *Fazaga*, 916 F.3d at 1253 (adopting the narrow articulation of the exception in *In re Sealed Case*).

Here, the Court has already reviewed the classified Steinbach declaration in camera, and it has already determined that the declaration fails to require judgment for the government. *Twitter*, 263 F. Supp. 3d at 816–17 (denying government's motion for summary judgment). As the Court wrote, the declaration failed to explain "how a restriction on [Twitter's] reporting . . . could be characterized as narrowly tailored to prevent a national security risk of sufficient gravity to justify the restraint, either in general or with respect to Twitter specifically." *Id.* at 816. It continued: "Without some more specific articulation of the inference the Government believes can be drawn from the information Twitter itself seeks to publish, even years later, the Court cannot find that the Government has met the high burden to overcome a presumption that its restrictions are unconstitutional." *Id.* at 817.

In short, the classified Steinbach declaration failed to establish a legally meritorious defense. Accordingly, even if the declaration is privileged and removed from the case, the "valid defense" exception provides no basis for dismissal. *See, e.g., Fazaga*, 916 F.3d at 1253.

B. The privileged and non-privileged information are not "inseparable."

Under the "inseparable evidence" exception, dismissal on the basis of the *Reynolds* privilege is permissible only where privileged and non-privileged evidence are "inseparable[,] such that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets." *Fazaga*, 916 F.3d at 1253 (quotation marks omitted) (quoting *Jeppesen*, 614 F.3d at 1083).

Here, even if the government were able to demonstrate that the entire classified Steinbach declaration is privileged, it is plain that it is "separable" from non-privileged information, and further litigation would not present an unacceptable risk of disclosure. Indeed, the government's motion to dismiss on the basis of the state secrets privilege is a motion *in the alternative*. *See*

Gov. Notice of Motion, ECF No. 281. The government thus concedes that, from its perspective, litigation on the merits of Twitter’s claims could proceed in this case—it merely objects to sharing with Twitter’s cleared counsel the same information it has already shared with the Court (without invoking state secrets at all). Gov. Br. 3. In other words, privileged and non-privileged information can be separated, and additional litigation would not present an “unacceptable risk of disclosing state secrets.” *Fazaga*, 916 F.3d at 1253.

Even setting aside the government’s concession, this Court should construe the “inseparable evidence” exception narrowly and hold that it has no application here. This is so for several reasons.

First, the “inseparable evidence” exception is both novel and rare. The Ninth Circuit articulated it for the first time in 2010, in an “exceptional” case in which the plaintiffs brought suit against a U.S. company, Jeppesen Dataplan, on the grounds that the company provided flight planning and logistical support for the CIA’s post-9/11 rendition and torture program. *Jeppesen*, 614 F.3d at 1075, 1089. Sitting en banc, the Ninth Circuit held that the “inseparable evidence” exception compelled dismissal. *Id.* at 1087. State secrets relevant to the case were “difficult or impossible to isolate,” and “even efforts to define a boundary between privileged and unprivileged evidence would risk disclosure by implication.” *Id.* at 1089. In those “rare circumstances,” the Ninth Circuit concluded that the risk of disclosure through litigation could not be averted through typical means, such as protective orders or restrictions on testimony. *Id.* The Ninth Circuit has not applied the exception since.

The facts of *Jeppesen* are a far cry from the case before this Court, where an internet service provider simply seeks to vindicate its First Amendment right to publish limited information about the number and type of national security requests it has received.

Second, given the rare application of the “inseparable evidence” exception, the Court should reject the government’s attempt to *expand* the exception by distorting the plain language of the Ninth Circuit’s test. Notably, the government frames the question not as whether

1 privileged and non-privileged information are “inseparable,” but instead as whether privileged
 2 evidence is “central” to these proceedings. Gov. Br. 23–24.

3 With this sleight of hand, the government is seeking to import a standard that appears in
 4 state secrets cases in the Fourth Circuit. *See, e.g., Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d
 5 1236, 1241–42 (4th Cir. 1985) (requiring dismissal where privileged evidence is “so central to
 6 the subject matter of the litigation that any attempt to proceed will threaten disclosure of the
 7 privileged matters”); *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007) (same).
 8 However, the standard in these Fourth Circuit cases impermissibly conflates the *Reynolds*
 9 privilege and the justiciability bar of *Totten v. United States*, 92 U.S. 105 (1875), and this Court
 10 should decline to adopt it.

11 In *Reynolds*, the Supreme Court upheld the claim of privilege over the accident report at
 12 issue, but it did *not* assess whether dismissal would be appropriate or whether additional
 13 litigation would create an unacceptable risk of disclosure. Rather, the Court remanded the case
 14 for further proceedings, so that the plaintiffs could pursue alternative sources of non-privileged
 15 evidence to prove their claim. 345 U.S. at 11–12.

16 In contrast, the so-called *Totten* doctrine completely bars judicial review of disputes over
 17 certain sensitive governmental contracts, such as espionage agreements. *See Totten*, 92 U.S. at
 18 107 (precluding adjudication of claims arising out of an alleged contract to perform espionage
 19 activities). As the Supreme Court has observed, in *Totten*-bar cases, “the very subject matter of
 20 the action . . . [is] a matter of state secret.” *Reynolds*, 345 U.S. at 11. In recent years, the Court
 21 has taken pains to distinguish the “evidentiary state secrets privilege” of *Reynolds* from the
 22 narrow non-justiciability rule set forth in *Totten*. *See Tenet v. Doe*, 544 U.S. 1, 8–9 (2005); *Gen.*
 23 *Dynamics Corp.*, 563 U.S. at 484–86. For example, in *Tenet*, the Court explained that claims
 24 based on alleged espionage agreements were subject to a “unique and categorical . . . bar—a rule
 25 designed not merely to defeat the asserted claims, but to preclude judicial inquiry.” 544 U.S. at 6
 26 n.4. *Reynolds*, however, involved “the balancing of the state secrets evidentiary privilege” and
 27 did not mandate dismissal. *Id.* at 10; *see also In re Sealed Case*, 494 F.3d at 151 (*Totten*
 28

1 “eliminates actions” and “performs a different function than *Reynolds*, which merely affects the
2 evidence available”).

3 Indeed, the Ninth Circuit has explicitly recognized that the Fourth Circuit’s approach
4 improperly “conflate[s] the *Totten* bar’s ‘very subject matter’ inquiry with the *Reynolds*
5 privilege.” *Jeppesen*, 614 F.3d at 1087 n.12 (observing that the court has “previously
6 disapproved of *El-Masri*” on this ground); *see also Al-Haramain*, 507 F.3d at 1201 (explaining
7 that the Fourth Circuit “has accorded an expansive meaning to the ‘subject matter’ of an action,
8 one that we have not adopted”).⁷

9 By asking this Court to dismiss Twitter’s case on the ground that “state secrets are so
10 central to the matter [that] any further litigation presents an unacceptable risk of disclosure,”
11 Gov. Br. 24, the government is effectively asking this Court to apply the *Totten* bar to preclude
12 judicial inquiry. However, this case does not involve a dispute over a sensitive government
13 contract, such that the “very subject matter” of the suit is a state secret, and application of the
14 *Totten* bar is entirely inappropriate.

15 **Third**, the “inseparable evidence” exception applies only where it is certain that, after
16 removing the privileged evidence from the case, further litigation based on non-privileged
17 evidence presents an “unacceptable risk of disclosure” of state secrets. *Fazaga*, 916 F.3d at 1253.
18 In assessing this risk, the Court must consider the wide-ranging mechanisms available—such as
19 sealing orders, protective orders, and redactions—that would allow litigation to proceed without
20 disclosing state secrets.

21 For decades, courts have encouraged judicial creativity in crafting procedures to respond
22 to the challenges posed by legitimate assertions of state secrets. This creativity is entirely in
23 keeping with the judicial role: “Courts of equity have the power and duty to adapt measures to

24 ⁷ Notably, even the “inseparable evidence” test effectively expands the ambit of the *Totten*
25 doctrine. The Court should reject the government’s efforts to expand it further. Although the
26 Ninth Circuit has referred to the “so central” standard in passing, *Fazaga*, 916 F.3d at 1227, it
27 has made clear that the definitive question is whether privileged and non-privileged evidence is
28 “inseparable,” such that litigating the case to judgment on the merits would present an
unacceptable risk of disclosure, *see id.* at 1228, 1253 (quoting *Jeppesen*, 614 F.3d at 1083).

1 accommodate the needs of the litigants with those of the nation, where possible.” *Loral Corp.*,
 2 558 F.2d at 1133. In cases where the privilege applies, courts have relied on that power to
 3 fashion procedures that circumscribe aspects of litigation rather than resort to outright dismissal.
 4 For example, in *Fazaga*, the Ninth Circuit ordered the district court to rely on the in camera
 5 review procedures in the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq.
 6 (“FISA”), to assess certain evidence falling *outside* of FISA’s purview. 916 F.3d at 1251–52.
 7 The court recognized that requiring dismissal on the basis of state secrets in those circumstances
 8 would have been an exercise in “empty formalism.” *Id.* at 1252. More generally, courts have
 9 accommodated the privilege by permitting the government to produce redacted versions of
 10 documents. *See, e.g., Kronisch v. United States*, 150 F.3d 112, 120 n.3 (2d Cir. 1998). Courts
 11 have also authorized measures analogous to those in the Classified Information Procedures Act,
 12 18 U.S.C. app. III, which applies to the use of classified information in criminal prosecutions.
 13 Under CIPA, in certain circumstances, courts permit the redaction of classified information from
 14 discoverable material, as well as the production of unclassified summaries in lieu of classified
 15 evidence. *See, e.g., In re Sealed Case*, 494 F.3d at 154 (approving CIPA-like procedures for the
 16 handling of state secrets-privileged information). And, of course, courts routinely rely on
 17 protective orders and sealing orders to prevent the disclosure of sensitive information. *See, e.g.,*
 18 *Ibrahim*, 912 F.3d at 1184; *Al-Haramain*, 686 F.3d at 982–85. Here, if there were any question
 19 as to whether litigation over non-privileged evidence might present an unacceptable risk of
 20 disclosure of state secrets, the Court has an abundance of tools at its disposal to accommodate
 21 the government’s legitimate security needs—without undertaking the radical step of barring a
 22 plaintiff from seeking judicial relief.

23 In the end, the “inseparable evidence” exception simply does not reach this case. That is
 24 because privileged information (if any) is separable from non-privileged, and continued litigation
 25 does not present an “unacceptable risk” of disclosure of state secrets. *Fazaga*, 916 F.3d at 1253.
 26 Seeking to avoid this conclusion, the government raises the possibility of a hypothetical future
 27 deposition of a government witness, in which Twitter would “have every incentive” to “probe”
 28

1 near the alleged state secrets in the classified declaration. Gov. Br. 24–25 (citation omitted). It
 2 contends that the risk of revealing those secrets compels dismissal here. *See id.* But if the
 3 government’s generic argument were correct, it would compel dismissal of virtually *any claim*
 4 tangentially related to privileged evidence. That result would be at odds with the Ninth Circuit’s
 5 rare application of the exception and the logic of *Reynolds* itself.⁸

6 As both Twitter and amici have explained, the classified Steinbach declaration is not
 7 subject to the privilege. But even if it were, the consequence is simply that the declaration is
 8 removed from the case, and the litigation proceeds. No exception to this general rule applies,
 9 and, accordingly, the Court should reject the government’s motion (in the alternative) for the
 10 dismissal of Twitter’s suit.

11 CONCLUSION

12 For these reasons, the Court should deny the government’s assertion of state secrets over
 13 the classified Steinbach declaration, deny the government’s motion to dismiss Twitter’s claims,
 14 and grant Twitter’s security-cleared counsel access to the classified Steinbach declaration under
 15 appropriate procedural safeguards.

16 Respectfully submitted,

17 Dated: May 6, 2019

18 /s/ Matthew Cagle
 19 Matthew Cagle (CA Bar No. 286101)
 AMERICAN CIVIL LIBERTIES UNION

20 ⁸ Of course, if a particular deposition did present an unacceptable risk of disclosure of privileged
 21 information, alternative procedures—such as court-ordered limitations on the scope of
 22 questioning, written questions, or ex parte questioning by the Court—are available. *See, e.g.,*
 23 *Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 82, 84 (D.D.C. 2004). Indeed, the
 24 government’s argument here is inconsistent with its position that special procedures for
 25 deposition and trial testimony can “strike an appropriate balance between, on the one hand, the
 26 Government’s interest in protecting classified and [state secrets] privileged information and, on
 27 the other hand, the parties’ interest in obtaining unclassified and non-privileged testimony.”
 28 United States’ Unopposed Motion for Procedures Governing Trial Testimony of Former
 Government Officials and Contractors, *Salim v. Mitchell*, No. 15-cv-286 (E.D. Wa. Aug. 2,
 2017) (ECF No. 229). And since this Court has determined that nothing in the Steinbach
 declaration satisfies “the high burden to overcome a presumption that [the Government’s speech]
 restrictions are unconstitutional,” any limitations placed on deposition testimony or other
 proceedings would provide no basis for dismissal.

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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION**

TWITTER, INC.,

Plaintiff,

v.

WILLIAM P. BARR, Attorney
 General of the United States, *et al.*,

Defendants.

Case No. 14-cv-4480-YGR

**[PROPOSED] ORDER GRANTING
 CONSENT MOTION OF THE AMERICAN
 CIVIL LIBERTIES UNION, THE AMERICAN
 CIVIL LIBERTIES UNION OF NORTHERN
 CALIFORNIA, AND THE AMERICAN CIVIL
 LIBERTIES UNION OF SOUTHERN
 CALIFORNIA FOR LEAVE TO FILE AN
 AMICUS CURIAE BRIEF IN SUPPORT OF
 TWITTER, INC.'S OPPOSITION TO
 DEFENDANTS' INVOCATION OF STATE
 SECRETS AND MOTION TO DISMISS**

Hon. Yvonne Gonzalez Rogers

1 Upon consideration of the motion of the American Civil Liberties Union, the American
2 Civil Liberties Union of Northern California, and the American Civil Liberties Union of
3 Southern California for leave to file as amici curiae in support of Plaintiff's Opposition to
4 Defendants' Invocation of State Secrets and Motion to Dismiss, it is hereby **ORDERED** that the
5 motion for leave to file is **GRANTED**. It is further **ORDERED** that the amicus curiae brief
6 attached to the motion is deemed filed with this Court upon entry of this Order.
7
8

9 **IT IS SO ORDERED.**

10
11 Dated: _____

12 Hon. Yvonne Gonzalez Rogers
13 United States District Judge
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